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In the Supreme Court of the United States

OCTOBER TERM, 1972

No 72-953

MICHAEL O'SHEA and DOROTHY SPOMER, *Petitioners,*

vs.

EZELL LITTLETON, et al., *Respondents.*

No. 72-955

W. C. SPOMER, *Petitioner,*

vs.

EZELL LITTLETON, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF EVELLE J. YOUNGER ATTORNEY GENERAL OF THE STATE OF CALIFORNIA AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

The opinion of the court below, extending the jurisdiction of the federal district courts over the day to day operations of a county prosecutor's office and limiting his traditional immunity from suits brought

under the Civil Rights Act, has implications that reach far beyond the borders of Alexander County, Illinois. As it presently stands, the decision of the Seventh Circuit portends the extension of federal supervision over every county prosecutor in every State of the Union.

Under article V, section 13 of the California Constitution, the Attorney General is charged with direct supervision over every district attorney and sheriff and the duty to see that state law is uniformly and adequately enforced in each of California's 58 counties. This state constitutional mandate necessarily requires him to resist the creation of precedent which would displace his supervisory powers with those of the federal courts. Also, once the federal courts have assumed supervisory powers over a county prosecutor's office, it would not be a long step for them to assume supervisory powers over a state attorney general's office as well. The interest of the California Attorney General in adequate and effective local law enforcement and in preserving his own supervisory powers thus brings him before this Honorable Court as amicus curiae.

SUMMARY OF ARGUMENT

Like judicial immunity, prosecutorial immunity is essential for the proper administration of justice. An injunction suit can be as disruptive as an action for damages, and its potential for abuse, coupled with the ease with which a claim can be pleaded and discovery

obtained, require that the prosecutor's traditional immunity from both types of suits be retained. Even the threat of such suits could improperly curtail a prosecutor's exercise of discretion.

In any event, if the federal courts undertake to exercise supervision over local prosecutors, the well established doctrines of federalism and comity require that they abstain from doing so until state supervising authorities have had a fair opportunity to act.

ARGUMENT

I

THE TRADITIONAL RULE THAT PROSECUTORS AS QUASI-JUDICIAL OFFICERS ARE IMMUNE FROM SUIT UNDER THE FEDERAL CIVIL RIGHTS ACT, INCLUDES IMMUNITY FROM INJUNCTIVE RELIEF AS WELL AS ACTIONS FOR DAMAGES

In *Pierson v. Ray,* 386 U.S. 547 (1967), this Court, describing the doctrine of judicial immunity as "solidly established at common law" (*id.* at 553-554) held that a judge may not be held liable in a damage action brought under the Civil Rights Act (42 U.S.C. §1983) for acts committed within his judicial jurisdiction. This immunity attaches without regard for the personal motives with which the judge may have acted. The Court had previously recognized legislative immunity in *Tenney v. Brandhove,* 341 U.S. 367 (1951).

The basic policy behind immunity was explained by the Court as follows:

> "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.
>
> "We do not believe that this settled principle of law was abolished by § 1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." 386 U.S. at 554-555.

Almost reluctantly, and under the compulsion of this Court's decision in *Pierson v. Ray, supra,* the Seventh Circuit held that a county prosecutor is immune from an action for damages brought under the Civil Rights Act (42 U.S.C. § 1983), but went on to hold that a district court may issue an injunction to control the day to day functioning of a prosecutor's office.

That a prosecutor's decision-making function is sufficiently similar to that of a judge to make applicable the doctrine of judicial immunity was recognized by the Seventh Circuit, "[T]he immunity, often characterized as 'quasi-judicial,' cloaking the prosecuting attorneys is, of necessity, derivative from

concepts developed in connection with the judiciary. . . ." 468 F.2d at 408-409.

The reasons why the prosecutor, nominally an executive officer, shares in an immunity conferred on the judicial branch, were concisely summarized in *Bauers v. Heisel,* 361 F.2d 581 (3d Cir. 1966) as follows:

> "In deciding the question of whether a prosecuting attorney is liable for acts done in his official capacity, we must decide whether his duties are sufficiently judicial as to cloak him with the same immunity afforded judges or are so closely related to those duties of law enforcement officials as to amerce him with potential civil liability for his imprudent actions. [Citation omitted]. Analogy could support either conclusion, but we believe that both reason and precedent require that a prosecuting attorney should be granted the same immunity as is afforded members of the judiciary. The reasons are clear: his primary responsibility is essentially judicial—the prosecution of the guilty and the protection of the innocent, [citation omitted]: his office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is accorded members of the bench. [Footnote omitted]. This reasoning is nearly as well established in Anglo-American law as judicial immunity itself." *Id.* at 589-590.

Since, as this Court has thrice noted, immunity is afforded a public official not for his own good but for

the good of the public (*Pierson v. Ray, supra,* 386 U.S. at 554; *Tenney v. Brandhove, supra,* 341 U.S. at 377; *Bradley v. Fisher,* 13 Wall. 335, 349 [1871]), it is the public interest which must ultimately determine whether a prosecutor's decision making function is subject to the injunctive power of the federal courts.[1]

This case comes before the Court in a factual setting involving confrontations between white citizens and black citizens in a small rural community, from the plaintiff's point of view, about as appealing a set of facts as could be conceived. However, once the federal courts begin to exercise supervisory jurisdiction over state prosecutors, it will prove impossible to confine that jurisdiction to cases involving alleged racial discrimination. As pointed out by the National District Attorney's Association in their petition for certiorari (pp. 18-19), the assumption that such suits if allowed would be seldom filed simply flies in the face of reality. There are any number of special interest groups[2] who would jump at the chance to

[1]To be distinguished are cases brought under section 1983 to enjoin a state court prosecution in which the district attorney is named as defendant, *e.g., Mitchum v. Foster,* 407 U.S. 225 (1972); *Younger v. Harris,* 401 U.S. 37 (1971). These cases, directed against the enforcement of specific statutes alleged to be unconstitutional on their face or as applied, in no way involve the prosecutor's exercise of discretion. In such cases the prosecutor is simply a nominal defendant, present in the case because a state or municipality is not a "person" within the meaning of section 1983. *Monroe v. Pape,* 365 U.S. 167 (1961); see also *Moor v. County of Alameda,* 41 U.S.L.W. 4627 (May 14, 1973). Here there is no attack on the constitutionality of the state statutes under which the prosecuting attorney is proceeding.

[2]The use of the term "special interest group" is not here intended as pejorative, but merely descriptive.

litigate in a federal court the question of whether a district attorney is prosecuting a class of cases with which they are concerned with either excessive or insufficient vigor. We know from experience in the Office of the California Attorney General, that the most bitter, personally vindictive and hard fought political battles occur not at the national or state level but at the county level, and more often than not feature allegations of district attorney incompetence, malice and even corruption. Clearly these conflicts should not be transferred to the federal courts.[3]

Our concern in supporting the argument for total immunity is not so much for the time of the federal court required to hear the case as it is for the disruptive impact of such litigation on a local prosecutor's office if the doctrine of quasi-judicial immunity is in any way abridged. Given the presence of a state officer subject to suit, it is relatively easy under modern federal pleading rules to state a cause of action under the Civil Rights Act. Indeed, this very Court in *Haines v. Kerner,* 404 U.S. 519 (1972), held that a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure should only be granted in a Civil Rights case when it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief.

The Seventh Circuit almost naively assumes that at worst the recognition of a cause of action would

[3]*Cf.* "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies." *Tenney v. Brandhove, supra,* 341 U.S. at 378.

require no more than that the district attorney periodically file with the court a report of his performance. 468 F.2d at 414-415. What it entirely overlooks is the impact on a local prosecutor of the broad discovery tools available to any plaintiff once the complaint has survived a motion to dismiss under Rule 12(b). "[T]he filing of a complaint pursuant to § 1983 in federal court initiates an original plenary civil action, governed by the full panoply of the Federal Rules of Civil Procedure . . . such a proceeding, with its discovery rules and other procedural formalities, can take a significant amount of time. . . ." *Preiser v. Rodriguez,* 41 U.S.L.W. 4555, 4561 (May 7, 1973). The district attorney, his assistants and investigators can be required to give depositions and answer lengthy and complex interrogatories, thus bringing their important prosecutorial functions to a standstill. Even more ominously, the files of a district attorney, previously assumed to be confidential, can be opened to potential criminal defendants. Indeed, it is not inconceivable that an astute criminal defendant could use the vehicle of an easily pleaded civil rights action to obtain access to materials not otherwise discoverable under state law.

In the conclusion of its opinion, Seventh Circuit claims that it has done no more than recognize a federal cause of action, assuming that this would impose no real burden on the defendants. What the Seventh Circuit appears to have overlooked is that curtailment of the prosecutor's immunity gives any disgruntled individual or group the opportunity vir-

tually to hamstring local law enforcement during the discovery phases of a civil rights case without regard to the factual merits of their claim. Thus the very pendency of a federal injunction action against a local prosecutor can have a drastic impact on his office in terms of time, diversion of resources and disclosure of confidential material even if the complaint ultimately proves groundless.

Moreover, even if the hopes of the Seventh Circuit come true, and such suits are seldom filed, the fact that such suits *could* be filed would have a "chilling effect" on the prosecutor's exercise of discretion. The decision whether or not to prosecute a given criminal offense is a delicate and sometimes difficult one in which considerations of the defendant's guilt and the prospects of obtaining a conviction or plea of guilty are only preliminary. See *Kaplan,* The Prosecutorial Discretion—A Comment, 60 Nw. L. Rev. 174 (1965). Injecting into the decision making equation, the threat of a federal lawsuit and its attendant disruption of his office, could well tip the balance in favor of prosecution in some cases where the prosecutor was uncertain of the defendant's guilt or less than confident of obtaining a conviction. (Significantly, in the present case, it is *not* alleged that the prosecutor refused to act even though he knew a conviction could be obtained.) To commence a prosecution without a reasonable hope of conviction has been described by this Court as "bad faith" conduct. *Younger v. Harris, supra,* 401 U.S. 37, 47-49 (1971); *Dombrowski v. Pfister,* 380 U.S. 479, 490 (1965).

It is no answer to say, as does the Seventh Circuit, that the federal courts, in entertaining such cases, are simply vindicating the public interest in "even-handed and nondiscriminatory enforcement of the laws." 468 F.2d at 413. The problem is that a private party or special interest group may have an individualized view of the public interest, or of nondiscriminatory law enforcement, poles part from the real thing. Indeed if the public interest could truly be objectivised, there would be no need for prosecutorial discretion at all. But the very recognition of the necessity that discretion be vested in prosecutors (*Bauers v. Heisel, supra,* 361 F.2d 581, 590) necessarily refutes that assumption. Having been given discretion, a prosecutor ought not be required to exercise it under fear of a federal lawsuit.[4] We respect-

[4]The American Bar Association Project on Standards for Criminal Justice in its standards relating to the Prosecution Function, approved draft 1971, contains the following: "(2.1) Prosecution authority should be vested in a public official. The prosecution function should be performed by a public prosecutor who is a lawyer subject to the standards of professional conduct and discipline. (3.4) Decision to charge. (a) The decision to institute criminal proceedings should be initially and primarily the responsibility of the prosecutor. (b) The prosecutor should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted. (c) Where the law permits a citizen to complain directly to a judicial officer or the grand jury, the citizen complainant should be required to present his complaint for prior approval to the prosecutor and the prosecutor's action or recommendation thereon should be communicated to the judicial officer or grand jury." (pp. 49, 83.)

The Commentary to these standards states in part: "The concept that the state has a special interest in the prosecution of criminal cases which requires the presence of a professionally trained advocate arose during the formative period of American law. Earlier, in England, it had been assumed that prosecution was a matter for the victim, his family or friends. See Schwartz, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY AND THE ADMINISTRATION

fully submit that the compelling public interest in the effective law enforcement at the county level requires no less than that the absolute immunity doctrine be retained in its entirety.

II

ASSUMING THAT A CAUSE OF ACTION MAY BE STATED FOR INJUNCTIVE RELIEF, THE FEDERAL COURTS OUGHT TO ABSTAIN FROM SUPERVISING THE OPERATIONS OF THE COUNTY PROSECUTOR'S OFFICE UNTIL STATE REMEDIES HAVE BEEN EXHAUSTED OR PROVEN INEFFECTIVE

California constitutional and statutory law places local district attorneys under the supervision of the state attorney general. Thus, article V, section 13 of the Califorina Constitution provides as follows:

> "Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be his duty to see that the laws of the State are uniformly and adequately enforced. He shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make to him such reports concerning the investigation,

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OF CRIMINAL JUSTICE 4-5 (1962). The idea that the criminal law, unlike other branches of the law such as contract and property, is designed to vindicate public rather than private interests is now firmly established. The participation of a responsible public officer in the decision to prosecute and in the prosecution of charge gives greater assurance that the rights of the accused will be respected than is the case when the victim controls the process.

"Whatever may have been feasible under conditions of the past, modern conditions require that the authority to commence criminal proceedings be vested in a professional, trained, responsible public official." (pp. 49, 84.)

> detection, prosecution, and punishment of crime in their respective jurisdictions as to him may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases he shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, he shall assist any district attorney in the discharge of his duties."

Pursuant to this provision, the California Legislature enacted section 12550 of the Government Code which provides:

> "The Attorney General has direct supervision over the district attorneys of the several counties of the State and may require of them written reports as to the condition of public business entrusted to their charge.
>
> "When he deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction. In this respect he has all the powers of a district attorney, including the power to issue or cause to be issued subpenas or other process."

Thus, even though California law does not authorize a private party or a court on its own motion to institute criminal proceedings (*People v. Municipal Court*, 27 Cal.App.3d 193, 103 Cal.Rptr. 645 [1972]),

any person or group of persons who feel that a district attorney is not properly enforcing the law may bring the matter to the attention of the Attorney General, who has the power and indeed the duty to intervene in the local situation if the facts require such action.

Accordingly, should this Court hold that federal courts may under the provision of the Civil Rights Act exercise supervisory powers over a district attorney's office, it should also formulate an abstention doctrine analogous to that enunciated recently in *Younger v. Harris,* 401 U.S. 37 (1971). In that case, this Court held that the fundamental doctrines of comity and federalism require that a federal court not issue an injunction to restrain a state criminal prosecution brought in good faith. The doctrines of comity and federalism were explained by this Court as follows:

> "The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. The doctrine may originally have grown out of circumstances peculiar to the English judicial system and not applicable in this country, but its fundamental purpose of restraining equity jurisdiction within narrow limits is equally important under our Constitution, in order to prevent

erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted. This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important

place in our Nation's history and its future." 401 U.S. 43-45.

Federal interference with a state prosecutor's decision whether or not to prosecute any number of state law violations committed by any number of potential defendants is at the very least as disruptive as the issuance of an injunction to restrain a single criminal prosecution. Consequently, where under its own law a state has provided a remedy for prosecutor misfeasance or malfeasance in office, considerations of federalism and comity require that the federal court abstain from exercising its jurisdiction until those remedies have at least been tried. Thus, it is oversimplistic to say, as did the Seventh Circuit, that there is no requirement for exhaustion of state legal or political remedies in a suit brought under the Civil Rights Act. 468 F.2d at 413. That statement ignores the well-settled doctrine of abstention. *Younger v. Harris, supra;* see also *Mitchum v. Foster,* 407 U.S. 230 (1972).

This Court recently held that injunctive relief under the Civil Rights Act is not available to state prisoners who can assert their claims on federal habeas corpus.

> "The rule of exhaustion in federal habeas corpus actions is rooted in considerations of federal-state comity. That principle was defined in *Younger v. Harris,* 401 U.S. 37, 44 (1971), as a 'proper respect for state functions,' *and it has as much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked.*

". . . The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." *Preiser v. Rodriguez, supra,* U.S.L.W. at 4560. (Emphasis added).

We therefore respectfully submit that even if this Court does hold that a cause of action was stated under the Civil Rights Act, the doctrine of abstention ought to apply in states like California which provide a remedy for prosecutorial malfeasance.

CONCLUSION

We respectfully submit that the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Dated, San Francisco, California,
June 6, 1973.

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